

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

**CLEANUP AND ABATEMENT ORDER NO. R9-2006-0102
AS AMENDED BY ADDENDUM NO. 1
AS AMENDED BY ADDENDUM NO. 2**

FOR

**LARRY & PENNY GUNNING
AND**

**PERRY & PAPENHAUSEN, INC. (AKA PERRY & PAPENHAUSEN
CONSTRUCTION)**

The California Regional Water Quality Control Board, San Diego Region (hereinafter Regional Board), finds that:

1. On August 23, 2006, the Regional Board Executive Officer issued Cleanup and Abatement Order (CAO) No. R9-2006-0102 to Larry and Penny Gunning and Perry and Papenhausen Construction (hereafter *Dischargers*) for unauthorized discharge of fill to San Diego Bay.
2. On October 13, 2006, the Regional Board Executive Officer issued Addendum No. 1 to CAO R9-2006-0102.
3. This second addendum to CAO No. R9-2006-0102 (Order) has been prepared to address the continued discharge of fill into San Diego Bay that has resulted from the unauthorized removal of riprap at 505 First Street in the City of Coronado and the construction of an unauthorized seawall at the same address. This Order supersedes and amends all previously issued version of CAO No. R9-2006-0102.
- 1.4. This Cleanup and Abatement Order is based on: (1) Chapter 5, Enforcement and Implementation commencing with Section 13300, of the Porter-Cologne Water Quality Control Act (Water Code) (Division 7 of the Water Code, commencing with Section 13000); (2) Water Code Section 13267, Investigations and Inspections, Chapter 4, Regional Water Quality Control; (3) all applicable provisions of the *Water Quality Control Plan for the San Diego Basin* (Basin Plan) adopted by the Regional Board including beneficial uses, water quality objectives, and implementation plans; (4) State Water Board Resolution No. 68-16 (*Statement of Policy with Respect to Maintaining High Quality of Waters in California*); (5) State Water Board Resolution No. 92-49 (*Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304*); and all other applicable legal authority.

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2.5. Larry and Penny Gunning (~~hereinafter Discharger~~) are the owners of the property located at 505 First Street, Coronado, San Diego County.

3.6. Perry & Papenhausen Construction, Contractor License No. 351216 830775 (~~hereinafter Discharger~~), is the construction firm hired by the Larry and Penny Gunning to remove existing shoreline riprap and construct a seawall and associated concrete footing at the shore side of the property at 505 First Street, in the City of Coronado, San Diego County.

4.7. Designated existing beneficial uses of coastal waters for San Diego Bay in the Water Quality Control Plan for the San Diego Basin (Basin Plan) include, Industrial Service Supply (IND), Navigation (NAV), Contact Water Recreation (REC 1), Non-contact Water Recreation (REC 2), Commercial and Sport Fishing (COMM), Preservation of Biological Habitats of Special Significance (BIOL), Estuarine Habitat (EST), Wildlife Habitat (WILD), Rare, Threatened or Endangered Species (RARE), Marine Habitat (MAR), Migration of Aquatic Organisms (MIGR) and Shellfish Harvesting (SHELL).

5.8. The San Diego Unified Port District (The Port) has jurisdiction over tidelands below the Mean High Tide Line (MHTL) in San Diego Bay, including those directly adjacent to the property at 501 First Street. The State Legislature has conveyed to the Port the authority to act as trustee for the administration and protection of these tidelands in San Diego Bay.

9. On or about May 1, 2006, Dischargers began removal of the existing riprap on the shoreline fronting 505 First Street using an excavator.

10. On or about May 8, 2006, Dischargers excavated soils, natural sand and debris about 48 inches wide and along the entire length of the northern property line for 505 First Street to accommodate the forms for the footing associated with the construction of an unauthorized seawall.

6.11. On or about ~~January 4~~ May 15, 2006, the *Dischargers* initiated construction of a 4 - 5 ft. high stacked, mortarless, concrete block wall (seawall), and a poured concrete footing directly adjacent to the seawall within waters of the U.S./State. Construction of the seawall was initiated in concert with the adjacent property at 501 First Street, in Coronado. The construction of the seawall and concrete footing is a discharge of waste to waters of the U.S./State in violation CWC Section 13260¹.

¹ Pursuant to CWC section 13260, "any person discharging waste or proposing to discharge waste, within any region that could affect the quality of the waters of the state..." shall file a report of waste discharge. The Regional Board has not received a 401 application or report of waste discharge for wastes discharged at the site.

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7.12. On May 22, 2006, a Port of San Diego survey crew determined that the 162 foot seawall's north edge roughly follows the Mean High Tide Line (MHTL) for its entire length. The Port survey also found that the poured concrete footing encroaches onto Port of San Diego property by approximately 1 foot for the entire length of the footing. Attachment No. 1 is a diagram depicting the results of the Port of San Diego survey of the site.

13. On June 12, 2006, a compliance inspection was conducted by Regional Board Staff. The inspection found that *Dischargers* had removed riprap from the shoreline on the bayside of 505 First Street and that an unauthorized seawall had been constructed along the property line of 501 and 505 First Street. The construction of the seawall and concrete footing and removal of riprap created an area of unstabilized sandy beach in San Diego Bay between approximately +2.0 ft. and +7.0 ft. MLLW.

14. Section 13304 (a) of the California Water Code provides that:

Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. A cleanup and abatement order issued by the state board or a regional board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.

15. Clean Water Act (CWA) section 404 requires any person proposing to discharge dredge or fill material into navigable water of the United States to obtain a Section 404 permit prior to such discharge. CWA section 401 requires that any person obtaining a Section 404 permit, obtain water quality certification from the

State in which the discharge occurs. California Water Code section 13376 requires that any person who is proposing to discharge pollutants or dredged or fill material into water of the state to submit a report of waste discharge pursuant to California Water Code section 13260 prior to such discharge. The Dischargers failed to obtain a section 404 permit and section 401 Water Quality Certification, and failed to file a Report of Waste Discharge for the removal of riprap and dredge and fill activities associated with the construction of the sea wall. Furthermore, Dischargers unauthorized activities are in violation of Basin Plan prohibitions.

8.16. Eelgrass (Zostera Marina) beds occur in shallow water directly adjacent to the sandy beach created by the project. Eelgrass vegetated areas are recognized as important ecological communities in shallow bays and estuaries because of their multiple biological and physical values. Eelgrass habitat functions as an important structural environment for resident bay and estuarine species, offering both predation refuge and a food source. Eelgrass functions as a nursery area for many commercially and recreational important finfish and shellfish species that are resident within bays and estuaries, as well as oceanic species that enter estuaries to breed or spawn. Eelgrass is a major food source in near shore marine systems, contributing to the system at multiple trophic levels. In addition to the habitat and resource value of Eelgrass, it serves beneficial physical roles in bays and estuaries. Eelgrass beds dampen wave and current action, trap suspended particulates, and reduce erosion by stabilizing the sediment. Eelgrass beds also improve water clarity, cycle nutrients, and generate oxygen during daylight hours.

9.17. The unauthorized discharge of fill and creation exposure of a sandy beach causes and threatens to cause a condition of pollution by directly affecting waters used for beneficial uses. Shoreline erosion of the newly exposed beach threatens beneficial uses by reducing water clarity necessary for the growth of eelgrass. Additionally, the redistribution of sediment from shoreline erosion threatens to degrade the eelgrass beds by covering and smothering the beds within the shallow waters of San Diego Bay.

18. The discharge or deposit of sand, soil and sediment into water of the state constitute "waste" as defined in California Water Code section 13304. The Dischargers, through this activity, have discharged waste and created a condition where waste continues to be discharged into waters of the U.S./State where it has caused and/or threatens to cause a condition of pollution or nuisance by increasing levels of sediment, and settleable and suspended material. The discharge of waste to the waters of the State in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance is also a violation of Basin Plan prohibitions.

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19. Dischargers have been required by this Order to clean up and abate the impacts of their unauthorized discharges since August 23, 2006. Nevertheless, Dischargers have yet to stabilize the shoreline and prevent further discharge.
- ~~10.20.~~ Cleanup and abatement action is necessary to ensure that the unauthorized discharges from the project cease to cause and threaten to cause conditions of pollution. Because cleanup and abatement activity will occur within and adjacent to San Diego Bay, best management measures during remedial action are necessary to prevent further conditions that threaten beneficial uses of San Diego Bay.
- ~~11.21.~~ Pursuant to Water Code Section 13304, the Regional Board is entitled to, and may seek reimbursement for, all reasonable costs it actually incurs to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Order.
- ~~12.22.~~ In accordance with Water Code section 13267 (b) these findings provide Dischargers with a written explanation with regard to the need for remedial action and reports and identify the evidence that supports the requirement to implement cleanup and abatement activities and submit the reports.
- ~~13.23.~~ This enforcement action is being taken for the protection of the environment and, as such, is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 2100 Et seq.) in accordance with Section 15321 (Enforcement Actions by Regulatory Agencies), Chapter 3, Title 14 of the California Code of Regulations.

IT IS HEREBY ORDERED that, pursuant to Section 13304 and Section 13267 of Division 7 of the California Water Code, the *Dischargers* shall:

1. Cease the discharge of sand, soil and sediment to water of the state and clean up and abate the condition of unauthorized discharge of fill to San Diego Bay in accordance with the schedule below.
- ~~1.2.~~ By October 23, 2006May 1, 2008, cleanup and abate existing and threatened pollution associated with the unauthorized discharge of fill to San Diego Bay by removing all unauthorized structures (including but not necessarily limited to the seawall and concrete footing) placed within waters of the U.S./State restoring and stabilizing the affected area to its pre-project condition or receive written approval from the Regional Board for an alternative Cleanup and Restoration Plan and Schedule.

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- 2.3. By ~~October 23, 2006~~ July 2, 2007, ~~return~~ stabilize the San Diego Bay shoreline by returning it to conditions similar to those that existed prior to the project by stabilization of the shoreline at the site with replacing riprap, in accordance with any Port of San Diego specifications and design standards. The *Dischargers* shall obtain all necessary approvals and permits prior to commencing shore stabilization activities.
- 3.4. By November 22, 2006, ~~t~~The *Dischargers* shall submit within sixty days of completion of Directive No. 2, a Cleanup and Abatement Progress Report that documents that the required on-site cleanup and abatement actions have been completed and that the stabilization measures consisting of engineered riprap and filter fabric lining have been constructed as authorized. If Directive No. 2 is not completed by May 1, 2008, then the Dischargers shall submit a report by June 1, 2008, and monthly thereafter until Directive No. 2 is completed.
- 4.5. By December 22, 2006, the *Dischargers* shall submit an Eelgrass Impact Assessment Report for the area of Bay impacted by the discharge. The report shall thoroughly map the area and distribution of existing eelgrass beds and delineate and quantify any impacts to eelgrass as a result of construction of the project. ~~If impacts to eelgrass have been discovered the report will also contain a conceptual mitigation plan consistent with the Southern California Eelgrass Mitigation Policy (adopted July 31, 1991). This assessment shall be performed by a qualified Biologist/Environmental Consultant with at least 5 years experience in the field of eelgrass assessment.~~
6. Continue to submit monthly Eelgrass Impact Assessment Reports by the 15th of each month with the first monthly assessment report being due on June 15, 2007, for the area of the Bay impacted by the discharge as determined by the Regional Board. If the Regional Board determines that eelgrass has been negatively impacted by the unauthorized discharge, then Dischargers shall prepare and submit an eelgrass mitigation plan consistent with the Southern California Eelgrass Mitigation Policy (adopted July 31, 1991). This mitigation plan shall be prepared by a qualified Biologist/Environmental Consultant with at least five years of experience in the field of eelgrass mitigation/restoration.
- 5.7. With each report required by this Order, provide under penalty of perjury under the laws of California a "Certification of Completion" statement to the Regional Board identifying that directives of this Order have been met.

The "Certification of Completion" shall include the following signed statement:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate

the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations. Pursuant to California Water Code Section 13350, any person who intentionally or negligently violates a cleanup and abatement order may be liable civilly in an amount which shall not exceed five thousand dollars (\$5,000), but shall not be less than five hundred dollars (\$500), for each day in which the cleanup and abatement order is violated.

NOTIFICATIONS

1. Requirements established pursuant to Water Code Sections 13304 and 13267(b) are enforceable when signed by the Executive Officer of the Regional Board.
2. The Regional Board reserves its right to take any enforcement action authorized by law for violations, including but not limited to, violations of the terms and conditions of this Cleanup and Abatement Order.
3. Pursuant to California Water Code section 13350, any person who intentionally or negligently violates a cleanup and abatement order may be liable civilly in an amount which shall not exceed five thousand dollars (\$5,000), but shall not be less than five hundred dollars (\$500), for each day in which the cleanup and abatement order is violated.
4. Pursuant to California Water Code section 13268, any person failing or refusing to furnish technical or monitoring program reports as required by Section 13267, or falsifying any information provided therein, is guilty of a misdemeanor, and may be liable civilly in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
5. The Discharger shall reimburse the State of California for all reasonable costs actually incurred by the Regional Board to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Cleanup and Abatement Order, according to billing statements prepared from time to time by the State Water Resources Control Board.
6. The Discharger shall properly manage, store, treat, and dispose of contaminated soils and ground water in accordance with applicable federal, state, and local laws and regulations. The storage, handling, treatment, or disposal of soil containing waste constituents and polluted groundwater shall not create

conditions of pollution, contamination or nuisance as defined in California Water Code section 13050(m). The Discharger shall, obtain, or apply for coverage under waste discharge requirements or a conditional waiver of waste discharge requirements for any discharge of the waste to (a) land for treatment, storage, or disposal or (b) waters of the state.

7. The Discharger(s) shall provide documentation that plans and reports required under this Cleanup and Abatement Order are prepared under the direction of appropriately qualified professionals. California Business and Professions Code Sections 6735, 7835 and 7835.1 require that engineering and geologic evaluations and judgments be performed by or under the direction of registered professionals. The Discharger(s) shall include a statement of qualifications and registration numbers, if applicable, of the responsible lead professionals in all plans and reports required under this Cleanup and Abatement Order. The lead professional shall sign and affix their registration stamp, as applicable, to the report, plan, or document.
8. The Discharger shall submit both electronic and paper copies of all workplans, technical reports, and monitoring reports required under this Cleanup and Abatement Order in accordance with Water Code Section 13196, Electronic Submission of Reports. Electronic submission shall be in PDF format, and include the signed transmittal letter and professional certification.
9. All reports required under this Cleanup and Abatement Order shall be signed and certified by the Discharger(s) or by a duly authorized representative of the Discharger(s) and submitted to the Regional Board. A person is a duly authorized representative only if: 1) The authorization is made in writing by the Discharger; and 2) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.).
10. All monitoring and technical reports required under this Cleanup and Abatement Order shall be submitted to:

Executive Officer
Attn: Southern Watershed Protection Unit
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

11. FAILURE TO COMPLY WITH THE PROVISIONS OF THIS ORDER MAY
SUBJECT YOU TO FURTHER ENFORCEMENT ACTION, INCLUDING BUT

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~~October 13, 2006~~ May 10, 2007

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NOT LIMITED TO, ASSESSMENT OF CIVIL LIABILITY UNDER SECTIONS
13268 AND 13350 OF THE CALIFORNIA WATER CODE AND REFERRAL TO
THE DISTRICT ATTORNEY OR ATTORNEY GENERAL FOR INJUNCTIVE
RELIEF AND CIVIL OR CRIMINAL LIABILITY.

2006 May 10, 2007

October 13,

JOHN H. ROBERTUS
Executive Officer

Date

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